

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 06-043514

Employee: Sharon Snyder
Employer: Consolidated Library District
Insurer: Guarantee Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, heard oral argument, read the briefs, and considered the entire record, the Commission issues this reversal of the award and decision of Administrative Law Judge Rebecca S. Magruder dated May 16, 2008 (Award), pursuant to section 286.090 RSMo and awards no compensation in the above-captioned case.

INTRODUCTION

The administrative law judge relied on the testimony of employee in reaching her conclusions. The administrative law judge also found that the "medical records consistently state that [employee] injured herself at work moving boxes." On the other hand, the judge reconciled employee's seemingly contrary statement to her doctor only eight days after the alleged onset of her injury as due to "miscommunication" that was "perhaps" due to her doctor's pregnancy and poor language skills. The administrative law judge held that employee sustained an accident at work on January 9, 2006, and, accordingly, granted her benefits.

Counsel for employer/insurer filed an Application for Review with the Commission.

SUMMARY OF FACTS

Employee had been working for employer since 1993. She began as a part-time page and ultimately became a full-time library assistant at employer's North Independence Branch.

As a library assistant, it was a part of her duties to deal with books and other library materials that arrived twice each day in plastic "tote" boxes. One of these deliveries came first thing in the morning. Normally, 15 to 18 totes were delivered each morning. These totes were divided evenly between the six to eight workers present. The number of totes delivered was sometimes greater immediately after the Christmas and New Year holidays.

During a period of about one hour before patrons arrived, employee and the other workers had to process the materials in the totes. New books went to the workroom. Returning books were checked back in and put on a cart for pages to re-shelf. Materials that had been put on hold were separated from the other materials.

Employee provided the following testimony. On January 9, 2006, employer was short-staffed in the morning, the workload was high, and employee began to experience pain in her arm during the hour that she was working with the materials from the totes. She had not felt any pain in her arm prior to the beginning of that

shift. Within a matter of days, employee told her immediate supervisor about the pain and that it was incurred at work. In fact, employee testified that she told the supervisor, Ms. Teagarden, “over and over again that [she] hurt [her] arm lifting those totes.”

Employee’s friend and immediate supervisor, Ms. Teagarden, recalled employee speaking to her and other workers about her medical problems but had no recollection of employee telling her that work caused such problems. Somewhat to the contrary, Ms. Teagarden was familiar with the need to file an incident report if an employee believed he or she was injured on-the-job; and said that if any worker indicated such an incident had occurred, she would have so advised him or her.

The first time Ms. Teagarden recalled employee telling her that employee’s medical problems were work-related was approximately April 21, 2006, when employee came to her with a letter from her health care insurer (Blue Cross Blue Shield). The letter was an inquiry as to whether her recent medical complaints were work-related. Employee did not know how to answer or proceed. She believed that surgery would be required. Ms. Teagarden had employee meet with her supervisor and, ultimately, Jennifer Reeder (employer’s benefits coordinator). After talking with Ms. Reeder, employee took the weekend to think about whether she wanted to proceed with a claim for Workers’ Compensation. On April 25, 2006, employee completed an incident report for employer; and on April 26, a Report of Injury was completed.

Employee’s first medical treatment revealed in the evidence was a visit to Dr. Britt Batchelor on January 12, 2006. Despite employee’s contention that she knew immediately she had injured herself at work on January 9, she listed “January 4, 2006” on the doctor’s patient data form she filled out as the date of her “illness.” Employee’s explanation for this date is that she was “brain dead.” Consistent with that note, though, the doctor made the following notation in his record: “[P]atient indicated pain has been present less than 8 days.” Right after the form asked for the date of the injury, it asked for the time and location of the injury. Employee checked the boxes indicating both “AM” and “PM,” as well as writing in “work/home.” On the doctor’s forms, employee was also asked “How did accident occur?” She was given the choice of three boxes: “Auto,” “On the job,” and “Other.” She placed an “X” by both “On the job” and “Other.” The doctor’s notes do contain the somewhat speculative comment, “poss moved books wrong.”

On January 16, employee went to Independence Urgent. The doctor’s entry from that visit stated, “Pt c/o neck pain X2 wks . . . she denies any trauma or fall recently.” It also indicates, “Neck pain of ? etiol[ogy].”

On January 17, employee visited her family doctor, Dr. Ghazal Shaikh. Dr. Shaikh spent more than half an hour with employee. The doctor’s notes from that appointment record, “No history of any trauma or fall but has been lifting furniture for the last two weeks.”

Employee did not allege and we have no evidence that employee was moving furniture at work. We do have evidence that employee and her husband were involved in an extensive renovation of their antebellum, 5,000 square foot home in the months leading up to October 2005, when the home was filmed for HGTV.

Employee testified that her family physician was a “foreigner,” that her doctor was “very much in labor when I was visiting her” on January 17, that she probably told the doctor she was moving “totes and at work and stuff. And again, she was in labor.”

Dr. Shaikh’s notes also indicate that the doctor will “schedule an EMG on the left upper extremity.” Dr. Shaikh arranged that EMG for the next day.

The notes of Dr. Kent Cooper, who carried out the EMG on January 18, contain nothing about a work-related injury. They also say that employee reported her symptoms as having been present for two or three weeks.

Although employee testified that her physician, Dr. Shaikh, was on maternity leave for three months immediately after January 17, 2006, the records show that she had a follow up visit with this doctor on March 16, 2006. The notes from this visit again read, "No history of any trauma or fall."

Dr. Shaikh arranged for an MRI. Dr. Stephen Dykstra's report from the MRI appointment on March 18 states as follows: "The patient has no history of recent injury."

Dr. Shaikh also arranged for employee to receive an epidural injection. This procedure took place on April 6, 2006. The notes from Dr. George A. Edwards on that date read, "Ms. Snyder states that this problem has developed over the last three months. She denies any significant injury or event that seemed to have triggered her problem."

April 21 was when employee talked with Ms. Teagarden and Ms. Reeder.

On April 25, 2006, when employee filled out the incident report, employer sent her to Dr. Doris Zhong. In speaking with Dr. Zhong, employee revealed that she was injured on January 9, 2006, "while she was unloading totes and boxes of books at the Library [that] weighed between 20 to 50 pounds."

DISCUSSION

As of January 2006, section 287.120.1 RSMo, as amended in 2005, provided in pertinent part as follows:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

The definition of "accident" was significantly changed in the 2005 legislation. Section 287.020.2 RSMo and related subsections read as follows:

2. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable;

(4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition;

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as

artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

In addition to these definitions, the legislature also provided the following additional legislation contained in section 287.020.10 RSMo, which reads as follows:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", arising out of", and in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W. 3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Lastly, sections 287.800.1 and .2 RSMo, respectively, provide as follows:

287.800. 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Pursuant to these statutes, in order for employee to establish a compensable case, she must have proven she sustained an injury due to an accident. Accordingly, we look first to see if claimant met her burden of proving that she suffered an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

Employee contends that her unexpected traumatic event or unusual strain identifiable by time and place of occurrence took place at her place of employment on the morning of January 9, 2006. She contends that she suffered immediate objective symptoms in the form of arm pain that did not exist prior to that shift. She contends that the specific event that caused her injury during a single work shift was dealing with totes and their contents during that morning.

Dispositive of this case is our determination concerning employee's credibility. Employee testified that she told her friend and supervisor, Ms. Teagarden, over and over about how she had injured herself at work on January 9, 2006. Yet, Ms. Teagarden testified that if anyone would have told her about a work injury, she would have had them complete an incident report. Ms. Teagarden had a clear recollection of employee discussing her medical problems, but no recollection of employee saying anything about those problems arising from work until April 21.

Employee also testified that she was not experiencing any problems with her arm prior to January 9, 2006, and that she realized she had injured her arm on the morning of January 9, but the medical records connected with her doctor visits during the early months after January 9 reveal a different picture.

Out of the seven doctor visits of which we have records (only two of which were to the same doctor, her family physician), the only unequivocal statement of cause for her injury was given to Dr. Shaikh. She told Dr. Shaikh that she had been lifting furniture the last two weeks. During one visit, she did not provide a reason for the injury. During four visits, employee stated either that she had not suffered any recent trauma

or injury or that she had not suffered any significant event or injury. As late as April 6, 2006, employee was still indicating that she had not had “any significant injury or event that seemed to have triggered her problem.” The visit to Independence Urgent on January 16 concluded that employee had neck pain of questionable etiology. During only one of these visits did employee tell the doctor that she “possibly” moved some books wrong.

Employee attempted to explain Dr. Shaikh’s very specific comment that she injured herself moving furniture over the course of the preceding weeks as a mistake due to the doctor’s being a foreigner and being very much in labor at the time of the January 17 appointment. Dr. Shaikh’s records, though, are thorough and do not indicate any language difficulties on the doctor’s part. Furthermore, if she were in fact in labor, she seems to have been nonetheless well focused and unhurried. She spent over half an hour with employee. She wrote detailed notes. She took the time to follow through with her thoughts and recommendations by setting an EMG appointment for employee the very next day with Dr. Cooper.

Furthermore, if Dr. Shaikh had simply made an error during the first visit, she had a chance to correct it during their second visit. Instead, Dr. Shaikh recorded that there was no history of trauma.

Employee had also listed January 4, 2006, as the date of her illness at her very first medical treatment of which we have a record. Employee’s explanation for that date was that she was brain dead. Most of the ranges of dates she supplied (for the onset of symptoms) during the first few appointments, though, seem to suggest an earlier date of injury than January 9.

Lastly, it seems peculiar to us, as well, that employee needed time (after she spoke with Ms. Reeder) to think about whether her injury should be reported as work-related or not. It either was or was not. It seems somewhat more than coincidental that employee’s recollection of a specific work injury that occurred during the morning of January 9, 2006, was triggered in late April 2006, after employee perceived that surgery might be needed; would probably need more time off work; and received a letter from her personal health care insurer asking whether her recent claims were work related.

The ultimate determination of credibility of witnesses rests with the Commission. The Commission should take into consideration the credibility determinations made by an administrative law judge. The Commission is not bound to yield to an administrative law judge’s findings, though, including those relating to credibility; and the Commission is authorized to reach its own conclusions. The law only requires the Commission to take into consideration the credibility determinations of an administrative law judge and not give those determinations deference. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo. App. W.D. 2004).

In the case at hand, since employee testified live before the administrative law judge, we have carefully taken into consideration her credibility determination concerning employee. Nonetheless, for the reasons detailed above, we find employee’s testimony not to be credible.

CONCLUSION

Because employee’s testimony was not credible, we conclude that she has failed to satisfy her burden of proving that she suffered an accident compensable under the Workers’ Compensation Law. Therefore, employee is entitled to no such benefits.

Accordingly, we reverse the Award of Administrative Law Judge Rebecca S. Magruder, issued May 16, 2008. Her Award is attached hereto solely for reference.

Given at Jefferson City, State of Missouri, this 30th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence, as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. I respectfully dissent from the decision of the majority of the Commission to deny benefits in this case.

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee: Sharon Snyder

Injury No. 06-043514

Employer: Consolidated Library District

Insurer: Guarantee Insurance Company

Additional Party: N/A

Hearing Date: April 10, 2008

Checked by: RSM/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 9, 2006.
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While lifting containers of books, Claimant injured her neck and arm.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: cervical spine, left arm.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$133.21.
17. Value necessary medical aid not furnished by employer/insurer? \$51,324.25.
18. Employee's average weekly wages: \$588.99.
19. Weekly compensation rate: \$392.66/\$365.08.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:	
unpaid medical expenses	\$51,324.25
63 3/7 weeks for temporary total disability up through date of hearing (4/18/08)	<u>24,905.85</u>
Total as of April 18, 2008:	\$76,230.10

Employer is to provide ongoing temporary total disability payments and medical treatment as outlined in Findings.

Said payments to begin and be payable and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Patrick Starke.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sharon Snyder

Injury No. 06-043514

Employer: Consolidated Library District

Insurer: Guarantee Insurance Company

Additional Party: N/A

Hearing Date: April 10, 2008

Checked by: RSM/lh

At the hearing the parties stipulated:

- that on or about January 9, 2006, Consolidated Library District was an employer operating under the provisions of the Missouri workers' compensation law and that their liability under said law was fully insured by Guarantee Insurance Company;
- that on or about January 9, 2006, Sharon Snyder, was an employee of Consolidated Library District and was working under the provisions of the Missouri workers' compensation law;
- that a Claim for Compensation was filed within the time prescribed by law;
- that the average weekly wage was \$588.99 and that the applicable compensation rate is \$392.66 for temporary total disability benefits and \$365.08 per week for permanent;
- that medical aid has been furnished by the employer and insurer in the amount of \$133.21.

The issues to be determined by the hearing are:

- whether Claimant sustained an injury by accident arising out of and in the course of her employment on January 9, 2006;
- whether notice was properly given under the law;
- whether temporary total disability benefits are owed as demanded from June 6, 2006 through June 23rd, 2006 and then from February 9, 2007 to the present;
- whether Employer should reimburse medical expenses incurred to date in the amount of \$51,324.25; and
- whether the Employee is entitled to additional medical care and treatment as a result of her alleged injury.

The evidence at the hearing consisted of Claimant's trial testimony, the independent medical examination report authored by Dr. Stuckmeyer and numerous medical records, as well as the deposition testimony of two fellow employees. The attorneys advised that the primary issues in this case were accident and notice and those will be dealt with in detail. Additionally, accident and notice were the only issues briefed by the parties.

Based on the evidence presented, I find the following facts:

Claimant started working part time as a page for the Independence Branch of the Consolidated Library Department in 1993. She eventually advanced to a full-time job as a library assistant. One of her job duties as a library assistant involved unstacking large tote boxes filled with books and then unloading the books from the totes. These book-filled totes could range in weight from 30 to 70 lbs. Christmas and New Year holiday season was the busiest time of year for the library. People tended to check out and return more material during that time of year than any other time. Therefore, at that time of year, the number and weight of the totes would be more than at any other time. I find that early January 2006 was no exception to this annual phenomenon.

In particular, I find that on the morning of January 9, 2006 there were more totes which needed unstacking and unloading than usual and that the library was short staffed on that day. Claimant testified, and I find in accordance

with that testimony, that while she was unstacking and unloading these totes between 7 a.m. and 8 a.m. on January 9, 2006, she noticed her left arm was sore and bothering her during that first hour of work. The soreness continued and intensified throughout the work day. She initially thought, however, that “it was just one of those things you shake off and go on.” She did know, however, that she had hurt or injured herself.

I further find that prior to 7 a.m., January 9, 2006, Claimant had no problems with her left arm or neck. She had never been treated by any medical provider for any neck or arm complaints before the day in question. In the months leading up to the accident, I find Claimant intentionally decreased all her physical activities in order to safeguard a skin graft she had undergone due to cancer on her nose.

Claimant saw a chiropractor within a few days, noting that the problem was related to home and work. The medical records consistently state that she injured herself at work moving boxes. In her initial report to the chiropractor, she checked that the injury occurred at work/home. She explained at the hearing that she checked “home” since she had continued to use her arm at home after the incident at work and the pain had worsened; she checked “work” since she was moving and unloading boxes at work when the pain began. Also relevant is the reference in her initial visit to Dr. Ghazai Shaikh regarding moving furniture. Claimant categorically denied ever stating that she had injured herself moving furniture, and affirmatively said she had told the doctor moving “totes”. Shortly after this visit, the same day, Dr. Shaikh went into labor and had a baby. Clearly there was some miscommunication between patient and doctor: perhaps Sharon said “boxes” and the doctor thought this was moving goods, perhaps the doctor simply thought a “tote” was a type of furniture, understandable given the language barrier and the Doctor’s personal circumstance. The balance of this particular medical note and the other several hundred pages of medical records, including Dr. Shaikh’s, all agree with Sharon’s testimony of how the injury occurred.

I. DID A COMPENSIBLE ACCIDENT OCCUR?

As of August 28, 2005, Section 287.020.2 RSMo defines accident as:

“...an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.”

(1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

1. It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

2. It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

No Appellate Court has passed on the meaning of the new law yet. However, the LIRC described the appropriate analysis in *Blevins v. St. John’s Medical Center*, No. 06-095060 August 27, 2006 as follows:

1. Was there an accident? An accident occurs only if there is an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. 287.020.2 RSMo.

2. Did it cause a compensable injury? An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” 287.020.3(1) RSMo.

In addition, the legislature abrogated all prior case law which interpreted the definitions of “accident,” “occupational disease,” “arising out of,” and “in the course of employment.” The legislature specifically negated the

holdings in *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo. App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying or following those cases. 287.020.1 RSMo. The crux of the change appears to be a switch from whether *the employment caused the injury* to *whether the accident caused the injury*. *Blivins, supra*. *Gamet v. Dollar General Store*, No. 06-064607, July 6, 2006.

While several ILRC decisions have dealt with the compensability of a particular injury, no decisions have dealt with what constitutes an accident.

1. Was there an accident?

The statutory elements of “accident” are as follows:

- An unexpected traumatic event **or** unusual strain
- Identifiable by time and place of occurrence
- Producing at the time objective symptoms of an injury
- Caused by a specific events
- During a single work shift.

The new statute mandates strict construction. 287.200 RSMo. Strict construction requires a court give a statutory provision no broader application than is warranted by its plain and ordinary meaning. *State ex. Rel. Dresser Industries, Inc. v. Ruddy*, 592 S.W. 2d 789, 794(Mo. 1980) The “plain and ordinary meaning is generally derived from the dictionary. *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338(Mo.banc 1991). In addition, strict construction does not allow the court to insert words not in the statute.

First, the statute allows **either** an unexpected traumatic event **or** unusual strain. Further, only the traumatic event need be “unexpected”; an unusual strain may be anticipated, as it was here, and met this element. In addition, the “unusual strain” need not come from a *traumatic* event given how the statute is written. Last, “strain” must refer to the effort by the employee, not the resultant injury; otherwise the definition would be circular. In other words, the strain refers to what the employee was doing, as opposed to what he suffered as a consequence of what he was doing. For example, a strain could be standing in an odd position for an extended period of time, perhaps resulting in a “strained” muscle. An unusual strain could also be the effort of moving significantly more than normal weight in a short period of time in a cramped space, as here.

Second, the accident must be “identifiable by time and place of occurrence”. Here, the “unusual strain” occurred sometime shortly after 7 a.m. and before 8 a.m. on January 9, 2006, meeting this requirement.

Third, the unusual strain must produce at the time “objective symptoms of an injury”. Reading some sense into the Legislature’s acts, the section must mean that the strain must produce symptoms at the time of the incident that a physician can later discover by examination since rarely is a physician ever present when an on the job injury occurs. Here the strain produced arm pain. This pain was caused by an injured cervical disk as demonstrated on an MRI test, which is generally agreed to be an objective finding. Consequently, this element is met.

Fourth, the strain must be caused by a specific event. Neither “specific” nor “event” is defined.

Webster’s defines “specific” as “precise or particular”. “Event”, is defined, again by Webster’s, as “something that occurs in a certain place during a particular interval of time.” An event can occur over a few seconds or a few hours. Melding the two definitions, we have a “precise or particular thing that occurs in a certain place during a particular interval of time”. Worthy of note is that an event, though it occurs over a particular interval of time, is not defined by a finite amount of time. An event can take an hour. Consequently, the unusual strain of lifting an extraordinary number of boxes during a period of time less than an hour at the same location certainly meets this definition even given strict construction.

Last, the unusual strain must occur during a single work shift, which this did.

In summary, a simple, plain view of the definition of accident using commonly understood definitions leads to the common sense conclusion that an accident occurred here within the definition of Chapter 287 here. Sharon clearly met her burden of showing an accident within the parameters of the amendments.

- **Did the unusual strain cause a compensable injury**

The 2005 amendments may have changed eligibility requirements but the employer is still liable for certain benefits when it is determined claimant had an injury by accident arising out of and in the course of employment. *Gamet v. Dollar General Store, supra.*

Subsection 2 of 287.020.3 provides guidance stating that

“An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.”

Prior to the 2005 amendments, if an employee was injured at work, his injury was generally deemed work related. The LIRC has held the new law requires the employee show some rational connection between work and the injury. *Bivins, supra.* The cases abrogated by the statute all had the common element that it was difficult, or impossible, to ascertain where, or if, the employment subjected the employee to some risk or hazard greater than that to which an employee regularly experiences in everyday life. With the change in the law, the issue becomes: was there a unique condition of the employment which contributed to the injury?

Here, Sharon worked in a cramped area lifting heavy boxes on a tight time schedule as a required part of her employment and employment duties. On the day in question, she and her fellow employees were burdened with work beyond what they normally performed. The required work activities and circumstances leading to her injury were unique in her life to her employment, as opposed to *Blivins, supra.* (employee unexplainably fell while walking down the hall) or *Johnson v. Town and Country Supermarkets*, No 06-078999 (employee’s ankle rolled while walking in parking lot).

In *Gamet v. Dollar General Store, supra.* the LIRC found a compensable injury under the new law. Mr. Gamet was injured while lifting and moving heavy boxes at work. The employer had assigned the employee heavier work that needed to be done quickly, as here. In fact, *Gamet* differs only in that there the injury could be attributable to an “unexpected traumatic event” as opposed to our case relating to an “unusual strain”. Otherwise it is a very similar factual circumstance with respect to whether an accident causing a compensable injury occurred, and the LIRC found the injury compensable.

The Claimant also satisfied the requirement that the accident be the prevailing factor in causing the injury. The only medical opinion evidence as to whether the accident was the prevailing factor causing Claimant’s injury was by Dr. James Stuckmeyer. His report dated July 6, 2007, contains the following relevant opinions:

“I feel within reasonable medical certainty that as a direct, proximate and prevailing factor of the accident date in discussion that Ms. Snyder did sustain a significant injury to her cervical spine necessitating the operative procedure provided by Dr. Chilton, specifically a C5-6 anterior cervical discectomy with fusion. Postoperatively the patient had temporary relief of her symptoms; however, the medical records would reflect that she has had multiple ongoing complaints as outlined by multiple physicians. Recently, on May 23, 2007, a follow-up MRI scan was obtained and did reveal evidence of a C6-7 leftward disk protrusion that appeared to compromise the left neural foramen and possibly cause at least moderate stenosis.

The patient did undergo a C5-C6 discectomy and fusion performed by Dr. Chilton and this would obviously represent a new level of pathology; however, on the preoperative scan performed at Medical Imaging on March 18, 2006, the

patient was noted at C6-7 to have a broad-based disk osteophyte complex which did not displace the cord but appeared to slightly narrow the lower portion of the left intervertebral foramen. The pathology identified at C6-7 may indeed be causing the chronic symptoms into the left upper extremity.

The occupational duties on January 9, 2006, are the primary or prevailing factor in the above stated injuries, need for medical treatment and subsequent disabilities.”

Because there is no other expert opinion evidence on causation to consider, Dr. Stuckmeyer’s opinion is uncontradicted. Medical causation in this case is clearly beyond lay understanding and requires expert opinion. The Missouri Supreme Court, in *Wright v Sports Associated, Inc.*, 887 SW2d 596 (1994) reminded this Administrative Law Judge that she could not substitute her personal opinion on medical causation of a herniated disc for uncontradicted causation testimony of Claimant’s physician. Therefore, I find, in accordance with Dr. Stuckmeyer’s uncontradicted opinion, that Claimant’s unstacking and lifting totes between 7:00 and 8:00 a.m. on January 9, 2006, was the prevailing cause (or factor) of the above-outlined injuries.

NOTICE

Employer has asserted the affirmative defense of lack of timely written notice of the injury as required by Section 287.420 RSMo. Employee contended that timely written notice was excused because employer was not prejudiced by its failure to receive timely notice.

Section 287.420 RSMo provides:

“No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice....”

This statutory provision is for the benefit of the employer. Its purpose is to provide the employer with an opportunity to investigate the circumstances of an alleged accident to determine if it was work-related and if a compensable injury did occur, to enable the employer to provide medical care to the employee in order to minimize any disability. *Pattengill v. General Motors Corp.*, 820 S.W.2d 112, 113 (Mo. App. 1991); *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498 (Mo. App. 1968). However, giving timely notice is not an unconditional prerequisite to compensability of an injury. *Messersmith v. Missouri-Columbia Mt. Vernon*, 43 S.W.3d 829, 832 (Mo. 2001). Written notice is excused when the employer is not prejudiced by the failure to receive such notice. *Pattengill, supra*; *Klopstein, supra*.

The employee has the initial burden of proving that the employer was not prejudiced by its failure to receive timely written notice of the injury. *Pattengill, supra*; *Klopstein, supra*. However, once a *prima facie* showing of lack of prejudice is made, the burden of proof shifts to the employer. *Hannick v. Kelly Temporary Services*, 855 S.W.2d 497 (Mo. App. 1993); *Ford v. Bi-State Development Agency*, 677 S.W.2d 899 (Mo. App. 1984).

A *prima facie* showing of lack of prejudice is made by establishing that actual notice was given to a supervisor within 30 days of the injury. *Id.*; *Ford, supra*; *Pattengill, supra*. Verbal notice given to a foreman or supervisory employee of a potentially compensable injury is imputed to the employer. *Dunn v. Hussman Corp.*, 892 S.W.2d 676, 681 (Mo. App. 1994); *Malcom v. La-Z-Boy Midwest Chair Co.*, 618 S.W.2d 725 (Mo. App. 1981). Whether an employer has actual notice of a compensable injury is a question of fact to be resolved by the administrative body. *Gander v. Shelby County*, 933 S.W.2d 892, 895 (Mo. App. 1996); *Weniger v. Pulitzer Pub. Co.*, 860 S.W.2d 359, 361 (Mo. App. 1993); *Summers v. Harbor Performance Corp.*, 754 S.W.2d 953, 954 (Mo. App. 1988). Once an employee establishes that employer had actual knowledge or notice of the injury within 30 days thereof, the burden shifts to the employer to prove that it was prejudiced by the lack of timely written notice. If it fails to adduce evidence of prejudice, employer will fail to overcome employee’s *prima facie* case. *Hannick, supra*; *Smith v. Arthur’s Fashions*, 843 S.W.2d 3 (Mo. App. 1992); *Pattengill, supra*.

With regard to the notice issue, I find the following facts. I base my findings on the claimant’s testimony and the

deposition testimony of two other Consolidated Library Department employees, particularly that of Catherine Teagarden. I find that within a few days of January 9, 2006, the claimant told Catherine Teagarden, her immediate supervisor, who was also her good friend, that she was having problems with her neck and arms. I also find that within that same time period she mentioned the January 9 tote lifting incident to Ms. Teagarden. I find that claimant does not remember exactly what she said to Ms. Teagarden but that she does remember telling her shortly after the accident occurred that she hurt and also told Ms. Teagarden how she thought had hurt it. Ms. Teagarden testified that she remembered the claimant complaining of arm numbness and pain but had no memory of whether or not the claimant told her about how the pain had started. She admitted that the claimant may have told her how it started but she just didn't remember one way or the other. Er. Ex 1, p.26.

Employer contends that the first notice they had of claimant's accident was on April 21, 2006, when the claimant received some type of letter (most likely from Blue Cross Blue Shield) regarding the claimant's alleged work injury. Claimant did not know what to do with the letter so she took it to Ms. Teagarden who gave it to Margaret Henry, the head librarian at the Independence branch. Ms. Henry advised the claimant to call Jennifer Reeder, the benefit coordinator at the library headquarters. At that time the claimant advised Ms. Reeder that she had been receiving various medical treatments since January and was now being recommended for surgery. Claimant told Ms. Reeder at that time that she thought that her left arm and shoulder problems were related to her neck and that she thought she had injured it when moving totes. Claimant further told Ms. Reeder that she had received a form from Blue Cross asking her whether the injury was work-related and she didn't know who to complete that form.

Claimant was referred to OHS by her employer on 4/25/06 and the Report of injury was filled out on 4/26/06.

Claimant testified and I find in accordance with that testimony that the doctor who saw her at OHS, Dr. Doris Zhong, told the claimant that she would have followed the very same medical procedures the claimant had been through up to that time.

Based on the foregoing, I have found the employer did not have written notice of the January 9, 2006 accident within 30 days of its occurrence. I have found, however, that claimant gave verbal notice of the accident and injury within the 30 days. Employer therefore had timely actual notice of the accident and claimant's *prima facie* burden was met. Therefore, the burden of demonstrating they were prejudiced by lack of written notice within the 30 days shifted to the Employer. This was not done. If anything, claimant showed a lack of prejudice by her seeking medical treatment within a week of the accident. Moreover, claimant's testimony that the OHS doctor would have followed the same medical protocol that the claimant had been through up to April 25, 2006 clearly shows a lack of prejudice to the employer.

If I had not found actual notice within the 30 days, the burden would have been on the *claimant* to show lack of prejudice. See *Soos v. Mallinckrodt Chemical Co.*, 19 SW3d 683, 686 (Mo. App. 2000). Claimant would have had to demonstrate that the employer's ability to investigate the accident was not hindered due to late notice *and* to have shown that the late notice did not deprive the employer of the opportunity of minimizing the injury by providing claimant with prompt medical treatment. *Seyler v. Spirtas Indus.*, 974 SW2d 536, 538 (Mo App. 1998). However, the employee has no such burden when the employer has actual notice within the 30 days. The burden shifted to the employer to show prejudice and that burden was not met.

TEMPORARY TOTAL DISABILITY, PAST MEDICAL AND FUTURE MEDICAL

The only evidence Employer presented with regard to these issues was essentially the deposition testimony of the two lay witnesses. The complete records and the independent medical exam of Dr. Stuckmeyer were offered on behalf of the Employee. Dr. Stuckmeyer addresses temporary total, past and future medical in his report dated July 6, 2007. Dr. Stuckmeyer also details the Claimant's course of treatment from his review of the medical records which is a most helpful review of the Claimant's treatment. I find in accordance with the records submitted, the Claimant's testimony, and Dr. Stuckmeyer's opinions that the Claimant is indeed entitled to temporary total disability benefits from June 6, 2006 to June 23, 2006 and from February 9, 2007 up through the date of the hearing and ongoing. Employer is therefore ordered to pay \$24,905.85 as of the date of the hearing and from that date forward to pay

\$392.66 per week for so long as an authorized treating physician states that the Claimant is unable to compete for any gainful employment. I also find that the medical treatment which was incurred was necessary and that the bills were reasonable. The Employer must therefore reimburse the Claimant \$51,324.25 in unpaid medical. Finally, the Employer is ordered to send the Claimant for any such cervical diagnostic studies that a physician deems required at this time and additionally if the physician feels that the Claimant would benefit from pain management, then a referral to pain management should proceed. See Report of Dr. Stuckmeyer.

Date: _____

Made by: _____

Rebecca S. Magruder
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeff Buker
Director
Division of Workers' Compensation

All statutory references are to the Revised Statutes of Missouri (2005) unless otherwise indicated.